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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

16 CR 468 (GHW)

5 JAMES GRANT and JEREMY
6 REICHBERG,

7 Defendants.

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8 November 27, 2018
9 9:08 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge
13

14
15 APPEARANCES

16 GEOFFREY S. BERMAN

17 United States Attorney for the
Southern District of New York

18 BY: JESSICA R. LONERGAN

KIMBERLY J. RAVENER

19 MARTIN BELL

Assistant United States Attorneys

20 HAFETZ & NECHELES, LLP

21 Attorneys for Defendant Reichberg

22 BY: SUSAN R. NECHELES

23 MERINGOLO & ASSOCIATES

Attorneys for Defendant Grant

24 BY: JOHN MERINGOLO

ANJELICA CAPPELLINO

25 ALSO PRESENT: JEFFREY G. PITTELL, CJA Counsel (Curcio Only)

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1 (Trial resumed; in open court; jury not present)

2 THE COURT: Counsel, thank you very much for being
3 here timely this morning.

4 Before we begin, is there any issue that any party
5 would like to bring to my attention?

6 MR. MERINGOLO: There's a big issue.

7 MR. BELL: I think so, Judge, yes.

8 MR. MERINGOLO: Judge, I'd like to begin. I'm sitting
9 outside in the hallway with five people -- four or five people.
10 Mr. Bell barges out, and threatens me, and tries to walk
11 towards me in a very confrontational way, so I pushed him away.
12 I did not pop him in his mouth, but I pushed him away from me.
13 Let's get the videotape. There's four witnesses, five
14 witnesses here, let's get their statements. It was unnecessary
15 coming out trying to threaten me.

16 THE COURT: Can I ask you, Mr. Meringolo, would you
17 mind just providing me with a brief description of what it is
18 that you saw happen? I heard the overview, but if you can
19 provide me some more specifics.

20 MR. MERINGOLO: That's it, Judge. I don't know what
21 caused Mr. Bell to run out of your courtroom to go and threaten
22 me in the hallway while I was talking to three people. I have
23 no idea what caused him to do that.

24 THE COURT: Thank you.

25 And when you say threatened?

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1 MR. MERINGOLO: Threatened. Threatened. Threatened,
2 Judge.

3 THE COURT: Your recollection of the statement was
4 what?

5 MR. MERINGOLO: It was a threatening statement.
6 That's what I recall. And there are five witnesses, also. Or
7 four witnesses.

8 THE COURT: Thank you.

9 Counsel for the United States?

10 MR. BELL: I guess that's me, Judge. I'm happy to
11 speak about this and what precipitated it.

12 As you're aware, we brought Mr. Rechnitz to a space
13 behind the courtroom largely for his protection, because he's
14 been the subject of some harassment. I can't quite say I
15 anticipated where the harassment would come from this morning.
16 We asked Mr. Daniels whether we could bring Mr. Rechnitz back
17 to the room here in advance of this morning's proceedings.
18 Mr. Daniels told us that was the case, and so we had two FBI
19 agents bring Mr. Rechnitz up from where he had been stationed
20 downstairs.

21 I wasn't present for this. What I did learn, as
22 Mr. Rechnitz and the FBI agents were making their way through
23 the room, was that Mr. Meringolo --

24 I'm sorry?

25 MR. MERINGOLO: Keep going.

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1 MR. BELL: Judge?

2 THE COURT: You can proceed.

3 MR. BELL: Thank you.

4 -- was that Mr. Meringolo apparently walked up to
5 Mr. Rechnitz and said something along the lines of: You're a
6 disgrace, which is attorney misconduct that I've never heard
7 of, points for creativity. This was something heard not only
8 by Mr. Rechnitz, but by the FBI agent and by Mr. Rechnitz's
9 counsel, Allen Levine, an officer of the court.

10 I was blown away by this. I walked back from where I
11 heard this, the space in which Mr. Rechnitz had been secreted
12 through the courtroom, to find Mr. Meringolo and find out what
13 business he had speaking to Mr. Rechnitz in any way, much less
14 an intimidating one. I came out to Mr. Meringolo and told him,
15 essentially, if you wake up and do something like that again,
16 you'd better apologize. That's incredibly improper.

17 Mr. Meringolo --

18 MR. MERINGOLO: Judge --

19 MR. BELL: Excuse me.

20 THE COURT: Mr. Bell, Mr. Bell --

21 MR. MERINGOLO: Where are the cameras? The cameras
22 are here. Where are the FBI agents?

23 THE COURT: I'm sorry. Mr. Meringolo --

24 MR. MERINGOLO: Let's put everybody on the stand.

25 THE COURT: I'm sorry. Mr. Meringolo, give us one

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1 moment, and let Mr. Bell explain, and then I'll give you the
2 opportunity to speak further. Thank you.

3 Please go ahead, Mr. Bell.

4 MR. BELL: Thank you, Judge.

5 Mr. Meringolo, who had been surrounded by four, or
6 five or so people, then burst through from that group, after I
7 said that, approached me -- I was still a good ten feet away
8 from him, pointing at him as I spoke -- and shoved me in the
9 chest. There was no contact on my part. He came up to me, he
10 shoved me in the chest. I know well where this happened is
11 covered by videotape because I have seen videotaped
12 confrontations in this space before. In the past, they have
13 been from unhinged family members after a distressing
14 proceeding.

15 So, again, this is something new, but I think the
16 videotape will make it relatively clear what happened.

17 Mr. Meringolo talks about threatening statements. He,
18 at that point, as he shoved me, uttered actual threatening
19 statements about how I'm lucky he doesn't drop me and things to
20 that effect.

21 Then, after Mr. Meringolo appeared in this courtroom,
22 where we were waiting for your Honor to appear, he said
23 essentially the same thing again. I suspect your Honor may
24 have heard this because your Honor was waiting to emerge for
25 the beginning of this morning's proceedings.

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1 As distressed as I am from Mr. Meringolo having come
2 up to me and shoved me in the chest, I am vastly more disturbed
3 by what he appears to have thought was appropriate contact with
4 Mr. Rechnitz, who we have discussed at length, both at sidebar
5 and in open court, being vulnerable to harassment, and the
6 Court has taken measures to prevent against that. That's what
7 I've got for you, Judge.

8 THE COURT: Thank you.

9 Mr. Meringolo.

10 MR. BELL: I will note, Judge, that once -- I think
11 our heads are still collectively spinning here, and we are not
12 entirely sure what to make of this. Ms. Lonergan and I have
13 been here for eight years, Ms. Ravener for a number of years as
14 well, we've never seen anything like this. It's our intention
15 to either move for sanctions or move to hold Mr. Meringolo in
16 contempt for both parts of what happened this morning.

17 I've never seen anything like this.

18 THE COURT: Thank you.

19 Any comments, Mr. Meringolo?

20 MR. MERINGOLO: I want to know when this happened with
21 Mr. Rechnitz, where are these agents. Pull the videotape from
22 here. Did it happen this morning? Did it happen last night?
23 If it happened last night, and the agents knew, why didn't they
24 inform the Court via email? It never happened. I've been with
25 my father every day that I leave that he's here. It didn't

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1 happen with Rechnitz. It did not happen. He came out and
2 threatened me. You're not allowed to come out running the
3 Court, run in the hallway, and move towards me, and threaten
4 me, and threaten my life. You're not allowed to do that. You
5 can't do that.

6 MR. BELL: For the record --

7 MR. MERINGOLO: And we have witnesses, too.

8 MR. BELL: For the record, Judge, I didn't threaten
9 anybody.

10 THE COURT: Thank you.

11 Just to be clear, Mr. Meringolo, Mr. Bell has stated
12 that you approached Mr. Rechnitz and said, in essence, you are
13 a disgrace. Do you --

14 MR. MERINGOLO: That never happened. That never
15 happened.

16 Judge, Judge, Mr. Rechnitz has a long history of doing
17 exactly this. For example -- and I need to put this on the
18 record on cross-examination -- he did this in California,
19 called Mr. Bell, said that he was threatened by an individual.
20 Thank God in that case, there was a videotape. He called his
21 handler -- I don't know who the FBI was -- said he was
22 threatened from Joel Eichner -- Joel Bress. Joel Bress. There
23 was a big investigation, a grand jury, unfounded. This is what
24 he does. He's saying that he's seen -- Mr. Bell and him are
25 saying to your Honor that they're seeing rabbis or people with

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1 hats in the back mock him. We have a videotape. Let's get
2 that. It doesn't happen, Judge.

3 If they wanted to do this to unhinge me, Mr. Bell
4 should have waited to go before your Honor instead of running
5 out of the courtroom, pointing in my face, threatening my life
6 in front of people. You can't do that to people, Judge. They
7 want sanctions on me. I want sanctions on them. When did they
8 find this out? Why didn't they go to the Judge last night?
9 Why didn't you call me? Where did this happen?

10 THE COURT: Thank you.

11 MR. BELL: It may be that Mr. Meringolo didn't listen
12 to my account. I want to be clear as to when this happened.
13 This happened this morning, as Mr. Rechnitz was being brought
14 from the elevator area to that room in the back.

15 MR. MERINGOLO: Well, then, we have a videotape, and
16 it never, ever, ever, ever happened.

17 MR. BELL: And to be clear, Judge, Mr. Meringolo is
18 out of his depths, I think, when speaking about the prior
19 incident with Mr. Bress.

20 THE COURT: That's fine. I don't think we need to get
21 into that.

22 MR. BELL: I don't think we need to dive into that,
23 but as to this incident, which is the one that matters, this is
24 something that the FBI agents heard, that Allen Levine saw,
25 that Jona Rechnitz saw. I do not believe that there is, at

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1 least last I checked, audio on the surveillance footage out
2 there, but I do believe that based on where I hear this
3 happened, that it's very possible that Mr. Meringolo's having
4 spoken to Mr. Rechnitz might have been picked up on camera. It
5 seems a decidedly bad move on his part, but whatever. I'm
6 noting this on the record now.

7 MR. MERINGOLO: Judge, I'm not starting this trial
8 until we see that videotape with Mr. Rechnitz because this
9 didn't happen. It did not happen. I'm not starting this
10 trial. I will not defend my client with Mr. Bell, and
11 Mr. Levine, and all these people making these allegations
12 against me. They're saying I committed crimes, and I want the
13 videotape. I want your Honor to see the videotape because this
14 is what's been going on in this case since day one. It's
15 Mr. Bell manipulating testimony, manipulating this.

16 Look at the tape, because I was with my father, I was
17 in here with your clerk, and I was by the window over there.
18 Where is the guy? Where is the tape? I went to the bathroom
19 once. Where is this tape? If it was on this floor this
20 morning, show me, because it didn't happen. It didn't happen.
21 I will not start this trial with criminal allegations against
22 me when they're saying this. And then, your Honor, if it
23 didn't happen, I want you, your Honor -- I would request you --
24 to order a criminal investigation based on this because it did
25 not happen. It did not happen.

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1 THE COURT: Thank you.

2 MS. NECHELES: Your Honor, can I be heard?

3 THE COURT: Yes, please, Ms. Necheles.

4 MS. NECHELES: I'm concerned now, because as I've
5 heard the prosecutors, as stated by Mr. Bell, they basically
6 just threatened criminal charges against Mr. Meringolo. They
7 said that they were going to seek to hold him in contempt,
8 bring criminal charges. And that's extremely problematic.

9 I am now representing Mr. Meringolo and would ask that
10 he sit down and stop going on about this.

11 THE COURT: Thank you.

12 MS. NECHELES: But I did, your Honor, see that there
13 was -- I saw Mr. Bell come charging out, very angry. I think
14 everybody was angry and heated, and that it escalated.

15 THE COURT: Thank you.

16 MS. NECHELES: But I think that there was -- we all
17 saw Mr. Bell charging out of here very angry. He may not have
18 thought he was threatening, but I think it did seem threatening
19 to others.

20 I don't think that this was an intentional sort of
21 con -- we all know Mr. Meringolo by now. He is someone who
22 gets passionate about things, and so does Mr. Bell. And they
23 both got very passionate this morning and exploded. I would
24 ask that maybe we have a little time for people to calm down
25 now. I think the whole situation --

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1 THE COURT: Let me -- just give me one moment. I
2 appreciate those comments. It is at peace with my thoughts,
3 and I think your comments are very helpful.

4 I do think the parties do need some time to step back
5 from the heat of this immediate incident. I can't resolve what
6 happened at this point from the bench. I've heard all of you
7 tell me things, and I have worked with you all over the course
8 of this trial, and I have great respect for each of you. I'm
9 not going to be in a position to decide here which version of
10 events is accurate.

11 I am concerned about whether Mr. Meringolo is in a
12 position now to work on the trial of this case with this issue,
13 having seen how heated the conversations have been about this
14 issue. I am concerned, frankly, for Mr. Meringolo's health,
15 but I also want to make sure that Mr. Grant's representation is
16 not affected by this incident in any way; i.e., I want to make
17 sure that Mr. Meringolo and the team for Mr. Grant is ready to
18 proceed. Mr. Meringolo has just stated that he's not ready to
19 proceed. That may be a thing of this moment.

20 MR. MERINGOLO: I apologize, Judge.

21 THE COURT: That's fine.

22 MR. MERINGOLO: But I want -- I need to see this
23 videotape -- both tapes, because this is an outrageous
24 allegation secondhand, number one, especially tampering with a
25 witness -- not tampering with a witness, saying he's a

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1 disgrace. It's just -- the video will show me in this
2 courtroom and by the window. So where -- and Mr. Bell came out
3 while I was by the window with everybody, and I was talking to
4 Ms. Necheles in front of the door. Where did this happen?
5 Where did this happen, Judge?

6 THE COURT: Thank you.

7 MR. BELL: Judge --

8 MR. MERINGOLO: And, Judge, I can't go on right now.
9 You can't make criminal allegations against me, you can't come
10 out there threatening my life like you're a big shot and think
11 I'm not going to -- I'm going to take the threats
12 wholeheartedly. I'm just not going to have it.

13 THE COURT: Thank you.

14 Can I ask just a very practical question? I think
15 that we need some time to work through this issue. My question
16 is: Is that a question of hours, or should I ask the jury to
17 go home for the day?

18 MR. BELL: Here's what I think, Judge, and I may be
19 able to shorten things significantly. As we typically do in
20 cases of the unforeseen and the rare, we had a brief exchange,
21 in part over email with the wiser minds in our appellate unit.
22 Having had that discussion, I think it's safe to say the
23 following: We do not intend to seek contempt or sanctions
24 against Mr. Meringolo at this time. We think that -- one
25 moment, please?

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1 (Pause)

2 MS. NECHELES: I think --

3 THE COURT: I'm sorry. Mr. Bell, you can continue,
4 and then I'll hear from Ms. Necheles.

5 MR. BELL: I think that we will reserve whatever
6 options there are, but it's not something that we intend to act
7 upon imminently. We think it's best for everybody to be able
8 to focus on the immediate task of conducting this trial and
9 getting through this witness' testimony.

10 THE COURT: Thank you.

11 MR. BELL: Given that, what my suggestion would be is
12 that everybody take about 15, 20 minutes to just take a deep
13 breath. As somebody who was actually shoved in the chest out
14 there, I think that's all I'll need, and I will be ready to go.

15 What I'd like to do is to be able to calm down
16 Mr. Rechnitz, who I think, although he's had a number of
17 circuitous twists through this ordeal, probably did not expect
18 exactly that to happen, and I want to make sure that he's ready
19 to proceed, but I don't think that's going to take terribly
20 long either.

21 THE COURT: Thank you.

22 MR. BELL: So I don't think there's a need to send the
23 jury home or delay things for any length.

24 There are one or two other issues we'd like to take up
25 before beginning this morning.

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1 THE COURT: Thank you.

2 Counsel?

3 MS. NECHELES: Your Honor, I think we need the day. I
4 would like to be able to talk with the U.S. Attorney's Office
5 about it. I think it is very difficult to put a lawyer in the
6 position where what I heard is we're not going to bring charges
7 now, but it's putting Mr. Grant in a very unfair position, and
8 I'd like to see if we can have discussions -- maybe we can view
9 the tapes, and we can have discussions with the office and
10 maybe see what way to proceed.

11 THE COURT: Thank you.

12 Counsel for Mr. Grant, what would you like to add?

13 MR. MERINGOLO: Judge, at this point, I'm irate and
14 wouldn't be effective right now.

15 THE COURT: Thank you.

16 MR. MERINGOLO: But we need to see these tapes. We
17 really need to see the tapes.

18 THE COURT: Understood.

19 So, counsel, with apologies, I'm going to excuse the
20 jury for the day. I don't believe that -- while I understand
21 the government may not be pleased about this, but I don't think
22 that the defense can proceed here. This is --

23 MR. BELL: Judge.

24 THE COURT: Please go ahead.

25 MR. BELL: Respectfully, Judge, this is a problem of

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1 the defense's making that now winds up being in a position
2 where Mr. Rechnitz, who does not live in this half of the
3 country, is vastly more likely now to have to continue his
4 testimony into next week. This is happening because
5 Mr. Meringolo saw fit to have utterly inappropriate contact
6 with him.

7 There is an injustice here. Ms. Necheles talks about
8 taking time to speak to the U.S. Attorney's Office. There's
9 nothing to talk about. We're not going to do anything with
10 respect to Mr. Meringolo at any point soon. They talk about
11 criminal charges, they talk about criminal allegations. We're
12 talking about something that happens under ordinary
13 circumstances where people note that an attorney has conducted
14 himself in a fashion that's inappropriate, but that's a side --
15 that's an utterly collateral issue.

16 Your Honor, this trial has dragged on long enough, and
17 we would ask, both for the sake of the jury's time, for the
18 sake of the witness' time, if it's a matter of taking a longer
19 amount of time this morning to resolve things and for everybody
20 to calm down, then that's fine, but I don't think that
21 anybody's provided a real reason why -- or a reason, by the
22 way, that wouldn't continue indefinitely were the matter not
23 resolved to Ms. Necheles' or Mr. Meringolo's situation past
24 today. I'd ask that you just give us a couple of hours, Judge,
25 but to delay things here would be unfair to the jury, to the

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1 witness, and I think, ultimately, to the government as well.

2 THE COURT: Thank you.

3 I agree that this is extremely unfortunate. I am very
4 mindful of the amount of time that the trial has taken, and as
5 you can see, I'm trying to be very conscientious of the jury's
6 time, but I also just observed the protestations of counsel,
7 and I don't believe, based on that, that I'm confident that
8 counsel, in particular for Mr. Grant, will be able to focus
9 thoroughly on his client's defense at this moment in time.

10 I'm not basing this decision on the possibility of
11 contempt sanctions or other action by the office against him;
12 I'm just basing it on the fact that people are feeling
13 impassioned and concerned about their own interests, and I
14 appreciate that, Mr. Bell, you've been very calm about this in
15 the face of what you've described as a physical contact, but I
16 don't think that everyone can be expected to approach the
17 situation with equal equanimity. And first and foremost in my
18 mind is ensuring that each of the defendants has the
19 opportunity to have a fair trial with effective representation,
20 and I'm not persuaded that at this moment, that will happen
21 with this hanging over the heads of counsel present.

22 I also don't think it's necessarily a good use of the
23 jury's time to keep them here for hours, have them listen to
24 two hours of testimony, and then to send them home. I think
25 it's more respectful of their time to give them the day off and

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1 let them go about their business. It's a freighted and
2 unfortunate resolution for what is clearly a freighted and
3 unfortunate situation, one that, in any event, should not have
4 occurred. So I'm going to ask Mr. Daniels to allow the jury to
5 leave. We will ask that the recordings, to the extent that
6 there are any, of videotape be secured.

7 I would like to make sure that when we start up again,
8 I expect the first thing tomorrow morning, that we are able to
9 begin promptly with our jury, and so I will ask the parties if
10 you think that we can come back later this afternoon to talk
11 about whatever issues are otherwise on the government's plate
12 and to talk about the limiting instruction that I wanted to go
13 to the parties, but I don't want to do that now. I'd like to
14 give the parties an opportunity to take a deep breath, and walk
15 around the block, and then talk to me about what you want to
16 do. I would like to convene again to do some administrative
17 work, but you'll just write me or call my chambers and let me
18 know what you want to do. I'm free until 3:00.

19 So, counsel, please reach out to me and let me know if
20 you're ready and able to get back today, but I think it's very
21 important for us to take a break.

22 MS. NECHELES: Your Honor, can we just try to schedule
23 something right now for 1:00 or 2:00, whichever is convenient
24 to the Court, how much time you think it would be, and then if
25 there's a problem, we'll let you know?

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1 THE COURT: I'd be happy to do that.

2 Counsel?

3 MS. NECHELES: 1:00 o'clock, does that work, your
4 Honor? Can the clients be excused, or would your Honor want
5 them here?

6 THE COURT: I am flexible. I don't know what the
7 nature is of the issues that the United States wants to bring
8 up. The issue that I want to discuss -- or the issues that I
9 want to discuss are: First, certain evidentiary issues with
10 respect to the defense exhibits; and, second, a proposed
11 limiting instruction based on Mr. Rechnitz's testimony, which
12 is basically a reiteration of the limiting instruction that we
13 provided at the beginning of his testimony with a version of my
14 intended limiting instruction with respect to the effect of
15 accomplice guilty pleas in the case.

16 MS. NECHELES: Thank you.

17 THE COURT: I'll see you all back here at 1:00.

18 MS. NECHELES: Yes. And I would ask that my client be
19 excused.

20 THE COURT: Thank you.

21 MS. NECHELES: Mr. Grant, also?

22 MR. MERINGOLO: If Mr. Grant could be excused, also.

23 THE COURT: Thank you.

24 MR. MERINGOLO: Judge, when can we get these tapes,
25 especially with Mr. Rechnitz? It's very important because it

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1 didn't happen, and I think it's -- it should be part of him
2 making stories up on cross. I mean, it just did not happen.

3 THE COURT: Thank you.

4 I'll ask Mr. Daniels to work with the court security
5 and the marshals to see what we can do to at least identify and
6 hold those tapes. Whether the parties will be able to disclose
7 them is unclear. I will take up any requests to show those to
8 the jury, but that would give us real concerns on my part.

9 So I'll see you back here at 1:00.

10 MS. NECHELES: Thank you, your Honor.

11 (Recess)

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1 THE COURT: So counsel, welcome back. Thank you very
2 much for being here.

3 MS. NECHELES: Your Honor, I have Mr. Stern from my
4 office sitting with me. Is that all right with your Honor?

5 THE COURT: That's fine.

6 MS. NECHELES: Thank you.

7 THE COURT: So I would like to take up a number of
8 matters. I think that the first issue I would like to address
9 are the consequences of this morning's events.

10 Just a couple of short comments. I have been informed
11 that the marshals have secured the video from outside of
12 courtroom. I understand that it would be provided to the
13 United States Attorney's Office. I have not watched it, and I
14 would recommend that, to the extent that the party,
15 particularly counsel for Mr. Grant, is interested in obtaining
16 it, that's a conversation that I would recommend be taken up
17 with the Department of Justice.

18 I would like to talk about the consequences of this
19 morning's issues, and in particular I'm concerned about the
20 conduct that was described to me may give rise to a conflict of
21 interest for Mr. Meringolo that will require, at a minimum,
22 conduct of a Curcio hearing.

23 Now let me emphasize I'm not taking a position at this
24 time regarding what happened outside my presence. I'm focusing
25 on the United States' comments about Mr. Meringolo's conduct

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1 and not Mr. Meringolo's comments about counsel for the United
2 States largely because I don't understand that I'm under an
3 obligation to conduct the kind of conflict inquiry with respect
4 to the counsel for the United States that I am with respect to
5 defendants. If the parties think that is an incorrect
6 understanding, you should let me know.

7 Counsel?

8 MS. LONERGAN: Your Honor, I'm sorry to interrupt.

9 THE COURT: That's fine.

10 MS. LONERGAN: We have been conferring with defense
11 counsel in order to hopefully move forward. I believe that we
12 are close to reaching some sort of proposal for the Court, but
13 I think that defense counsel has asked to consult with one of
14 their clients, and that that should be able to take place in
15 approximately the next ten minutes.

16 THE COURT: Sorry, can you explain what it is you're
17 referring to?

18 MS. LONERGAN: Your Honor, yes. I think that we may
19 have an agreed-upon proposal between the parties to present to
20 the Court, but that defense counsel, before agreeing to that
21 proposal, would like to consult. Specifically, Mr. Meringolo
22 would like to consult with Mr. Grant before we make that
23 proposal to the Court.

24 THE COURT: Thank you. Would this resolve the
25 possibility of any kind of conflict that must be the subject of

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1 the Court's inquiry?

2 MS. LONERGAN: It may, your Honor.

3 THE COURT: Let me be clear, the circuit puts me under
4 an obligation to inquire regarding potential conflicts.
5 Earlier the United States this morning said that it might seek
6 contempt or other sanctions against Mr. Meringolo for his
7 conduct. While I heard the other comments made by the United
8 States that they do not expect to foresee such action at this
9 time, that's different from saying they will never do so or
10 that they're granting Mr. Meringolo immunity for any potential
11 criminal conduct.

12 I'm concerned about that comment, and I'm also
13 concerned because what the United States described to me might
14 be considered to be criminal conduct, namely threatening a
15 witness, physical assault here in federal property, and threats
16 of violence to a federal prosecutor in the conduct of his
17 business. Those acts, if true, may be the basis for a
18 potential criminal prosecution, the decision about which
19 presumably would be made by the office of the prosecutors here
20 who are present and who were involved in the underlying
21 incident.

22 So I don't know exactly what the proposal is that the
23 parties might seek to bring to me, but it appears that there is
24 a potential conflict of interest. And so my agenda, as
25 dictated by the Circuit, is to inquire about the nature of the

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1 conflict to determine whether or not it is one that is
2 potential or actual or one that is waivable or not waivable.
3 And if it's waivable, to take appropriate steps in order to
4 protect against potential appellate review regarding a
5 conflict.

6 MS. LONERGAN: Your Honor, we understand that. We
7 think the Court's inquiry into all of those matters, however,
8 will be informed by the proposal that we seek to put before the
9 Court.

10 However, we just feel that we don't want to seek to
11 put that proposal before the Court before we have Mr. Grant's
12 essential approval to that proposal. My understanding from
13 defense counsel is that Mr. Grant is minutes from the
14 courthouse and that it will be a fairly short conversation once
15 he arrives, such that we should be able to take up this matter
16 with additional information that will inform the Court's
17 inquiry in approximately 10 to 15 minutes. And we think that
18 it makes sense to structure the conversation in that way, given
19 that that additional information will likely influence the way
20 that the Court wishes to proceed this afternoon.

21 THE COURT: That's fine. Thank you. I'm happy to
22 allow counsel more time to confer with his client about this
23 issue.

24 MS. LONERGAN: Your Honor, just noting for the record,
25 it appears that Mr. Grant has just arrived, so this

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1 consultation could likely happen now if the Court would give
2 the parties the time to do that.

3 THE COURT: Thank you. I will happily give the
4 parties time to discuss that issue.

5 Sorry, I did not realize that Mr. Grant was not
6 physically present here earlier. Let me say again what I said
7 earlier, just to make sure that Mr. Grant has also heard these
8 comments.

9 The concern that I articulated earlier was that the
10 issues that arose this morning might give rise to a potential
11 conflict of interest for Mr. Meringolo that would require the
12 conduct of a Curcio hearing. As I said earlier, the Court
13 isn't taking a position on what happened outside of my presence
14 earlier today, and as I said, I'm not talking about
15 Mr. Meringolo's comments about Mr. Bell's conduct at this time
16 because I don't understand that I'm under a legal obligation to
17 take up an inquiry with respect to those issues.

18 Now the United States said this morning they might
19 seek contempt or other sanctions against Mr. Meringolo for his
20 conduct. They changed their position saying they do not expect
21 to do so now. During the course of our conversation they did
22 not say that they would never do so. I should be clear, I'm
23 not requesting or requiring that the government or anyone else
24 agree to take or not take any particular course of conduct in
25 order to address this issue.

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1 I said that I'm concerned also because the United
2 States has described what might be considered to be criminal
3 conduct, namely threatening a witness, physical assault here in
4 federal property, and threats of violence to a federal
5 prosecutor in the conduct of his business. Those acts, if
6 true, might be the basis for a criminal prosecution, one about
7 which the decision would be made by presumably the office of
8 the prosecutors who are here present.

9 So the law in this Circuit requires that where the
10 Court is alerted to a potential conflict of interest, I must
11 inquire about it and then take appropriate steps to determine
12 whether or not the conflict is one that is waivable, and if it
13 is one that is waivable, to take appropriate steps in order to
14 ensure that the waiver is knowing, voluntary and intelligent.

15 So I don't know what the solution is that the parties
16 are talking about, but it's also not clear to me how it would
17 be that it would possibly obviate the need for some sort of
18 inquiry regarding the waiver. I understand that what the
19 nature of the issue is may be informed by the parties'
20 presentation to the Court, which will take place momentarily.
21 That's the substance of what I described earlier.

22 So I'm happy to step down now. Counsel, please let
23 Mr. Daniels know when you're ready to start again.

24 Let me say this as well, to the extent that a Curcio
25 hearing must take place, the parties may wish to consult on

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1 whether or not we can get that done today. And the more time
2 that is taken up in consultations and the like before we begin
3 working on that process, the less likely it is that we'll be
4 able to take that up today and more likely it is that it will
5 eat up our trial time tomorrow. So I look forward to hearing
6 from you.

7 Anything else that I should take up before we step
8 down?

9 MS. LONERGAN: No, your Honor. Understood. And we'll
10 send a message to Mr. Daniels as soon as possible.

11 THE COURT: Counsel for Mr. Reichberg, anything else?

12 MS. NECHELES: No, your Honor, thank you.

13 MR. MERINGOLO: No, Judge.

14 THE COURT: Thank you. See you after the recess.

15 (Recess taken)

16 THE COURT: So counsel, when I left the United States
17 had told me that the parties were talking about some resolution
18 that might affect in some way what may be a potential conflict
19 of interest. What information would you like to share?

20 MS. LONERGAN: Yes, your Honor, thank you for giving
21 us the opportunity to consult.

22 After our consultation we wanted to inform the Court
23 that we have brought this matter to the attention of our
24 supervisors, and there's been consultations up to the U.S.
25 Attorney, and it is our position, the position of the office,

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1 that we will not be pursuing this matter in any way at all any
2 further, not later, not now, not at all.

3 And in light of that position, we do not believe that
4 there is any sort of potential conflict because of our position
5 that we are taking this matter essentially, based on
6 representation, off the table. We will not be pursuing it in
7 any way.

8 THE COURT: Thank you. Is there some kind of
9 agreement between the office and Mr. Meringolo that protects
10 him against future changes of position by this or any other
11 prosecutorial office?

12 MS. LONERGAN: Your Honor, there's no written
13 agreement. We have consulted with Mr. Meringolo. We have the
14 chief of the criminal division here. She has also spoken with
15 Mr. Meringolo and informed him that that was the office's
16 position and that our office will not be pursuing this matter
17 in any way.

18 THE COURT: Thank you. By "this office," are you
19 speaking on behalf of the United States Department of Justice
20 as a whole?

21 MS. LONERGAN: Your Honor, may I have one moment to
22 confer?

23 THE COURT: Yes, please take your time. I will be
24 interested in hearing whether you think that this arrangement
25 impacts anything other than the content of the statements that

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1 I will ultimately have to make during a Curcio hearing as
2 opposed to whether or not one must take place.

3 (Pause)

4 THE COURT: Counsel, before you respond to my
5 question, let me ask, for my benefit, what impact the
6 government thinks that this has on the question of whether or
7 not this is a waivable conflict. In other words, the
8 government has agreed to -- or I should not say the government,
9 the office has made an oral representation to the Court that it
10 will not prosecute Mr. Meringolo for his conduct. Why does
11 that make a difference? In other words, if the government was
12 not taking that off the table, why would it change the nature
13 of the question whether or not the conflict is waivable?

14 MS. LONERGAN: Your Honor, because I think, from our
15 understanding, we don't really understand necessarily what the
16 conflict would be. A conflict might be, for example, if we had
17 not taken this position that the questions the Court might pose
18 to Mr. Grant would be does the possibility of your attorney --
19 the possibility of some sort action against his attorney.

20 Given that we are representing here, and I will
21 further the representation with respect to the Court's prior
22 question, that there will be no action by our office, that
23 there's, as we just put on the record, an oral agreement not to
24 pursue this in any way or manner by our office. We cannot bind
25 the Department of Justice as a whole, but this incident

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1 happened in the Southern District of New York in a trial
2 proceeding in the Southern District of New York and we are not
3 intending to make any referrals to any body.

4 And I just note for the record, for example, when we
5 enter into a plea agreement with a defendant such as the
6 cooperating witnesses in this case or any defendant, it
7 similarly is a plea agreement with respect to only our office
8 because we cannot bind the entire Department of Justice. But
9 in light of that position, we think that there is no conflict
10 because we have represented here and in oral agreement with
11 defense counsel that we will not be pursuing any form of action
12 in any way.

13 THE COURT: Thank you. And as the parties are aware,
14 the consequences of this conduct are not limited to the
15 prospect of criminal prosecution by the United States but also
16 a potential disciplinary action by the grievance committee of
17 this Court or by appropriate bar organizations.

18 Counsel for the United States, first, again I don't
19 completely appreciate what it is that the government seeks to
20 achieve through this, in other words, whether or not this is
21 better than simply conducting a Curcio hearing with respect to
22 a possible pending prosecution and these other issues. I
23 understand that the government has taken the position that it
24 has. I don't know that it takes off the table the need for a
25 Curcio hearing with respect to potential conflict, and so as a

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1 result it's not completely apparent to me why it is the
2 government is taking the step that it has. That is your
3 decision.

4 What's your view regarding the prospect of the
5 potential disciplinary action against Mr. Meringolo as a result
6 of conduct asserted by the United States during the course of
7 today's earlier proceeding and whether or not that could
8 represent a conflict?

9 Counsel, unless you think that this is an unwaivable
10 conflict, the price for dealing with this is the conduct of a
11 Curcio hearing at which we would ensure that Mr. Grant is aware
12 of the consequences of the issue.

13 So I want to understand what the government's position
14 is on whether the government's position is that these are
15 unwaivable conflicts such that a Curcio hearing is neither
16 necessary nor would it be effective.

17 MS. LONERGAN: One minute, your Honor.

18 (Pause)

19 THE COURT: Thank you. The baseline question here
20 ultimately is whether or not the solution that you're proposing
21 to the Court is more efficient or effective than conducting an
22 appropriate Curcio hearing.

23 (Pause)

24 MS. LONERGAN: Your Honor, thank you again for
25 allowing us the time to consult on this. I think that there

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1 are two pending questions. Let me try to answer them both.

2 First, with respect to any disciplinary action, we
3 have the same position, which is that we do not intend to make
4 any referrals. Again, we can only bind our office, but we are
5 not intending on making any ethical or disciplinary referrals.

6 On the Court's second point, while our position
7 continues to be we do not believe a Curcio hearing is
8 necessary, however, we do think it is a waivable conflict. So
9 if the Court wants to proceed with a Curcio hearing, I think
10 that we can do that this afternoon. We ask the Court's deputy
11 to make a phone call to mag court to have a CJA lawyer sent to
12 the courtroom to consult with Mr. Grant before the Curcio
13 hearing.

14 THE COURT: Thank you. And what's the difference in
15 the position with respect to whether or not this is a waivable
16 conflict as a result of the government's agreement not to
17 proceed with the possibility of charges against Mr. Meringolo
18 or not? How does that decision affect this issue?

19 MS. LONERGAN: Your Honor, again, we do not believe
20 there's a conflict at this point, but we think that to the
21 extent there is, it's waivable. We think that that would be
22 the case even if we hadn't made the representation that we did,
23 but, particularly in light of the representation that we have
24 just made to the Court, that this is most certainly a waivable
25 conflict and that it can be addressed through a Curcio hearing

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1 to the extent that there is a conflict at all.

2 THE COURT: Thank you.

3 Let me hear from counsel for Mr. Grant. Counsel,
4 what's your view? As you know, my concern is to make sure I
5 understand what the nature and extent of any possible conflict
6 could be and also to ensure that if there is such a conflict,
7 whether or not it's waivable, and if so, what steps we should
8 take.

9 MS. CAPPELLINO: Your Honor, we concur with the
10 government. We don't believed there's any conflict. To the
11 extent there's a potential conflict, we would be happy to have
12 a Curcio hearing, and we would have to waive that.

13 THE COURT: Thank you. What's the nature of the
14 potential conflict? I ask in part so that the appropriate
15 questions can be framed here.

16 And counsel, you understand the consequences, counsel
17 for the United States in particular, and if all possible
18 grounds aren't covered, or I should say if I do not do a
19 thorough job capturing all possible conflicts and Mr. Grant is
20 not adequately informed, the case could be brought back to try
21 the case again. So I hope the parties will help me to frame
22 the questioning in a Curcio appropriately, given those
23 possibilities.

24 Ms. Cappellino, what would you say in response to my
25 questions about the absence of a written agreement immunizing

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1 Mr. Meringolo from any potential prosecution by the federal
2 government with respect to this issue, and also the possibility
3 of disciplinary proceedings either by the grievance committee
4 of this Court or bar associations or other similar
5 organizations?

6 MS. CAPPELLINO: Your Honor, we don't see a potential
7 conflict of interest arising here. We are assured by the
8 government's verbal proffers before the Court, so we do believe
9 that takes away any sort of potential for conflict.

10 So as far as crafting questions, we would defer to
11 your Honor to the extent necessary. We don't believe a
12 conflict exists or can exist under the circumstances presented
13 today by the government.

14 THE COURT: Thank you.

15 Counsel for Mr. Reichberg?

16 MS. NECHELES: Thank you, your Honor.

17 Your Honor, thank you for giving us the time to try to
18 calm things down. I think it was extremely helpful and I think
19 everybody sort of took a step back and realized we have all
20 worked very hard on this trial and that we all want it to go
21 forward, that people's tempers were up, and that was needed to
22 take a step back.

23 And I think that the office has really come forward
24 and reassured us that the situation that I was concerned about
25 before earlier today was not -- I understand their statements

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1 here to be binding agreement, assured me it is a binding
2 agreement, that they are putting it on the record. It's not a
3 written agreement, but it is an oral agreement that they will
4 not be bringing any charges and they will not be making any
5 referrals, any ethical referrals here. And so I believe, with
6 that in mind, that we could all go forward on this.

7 I'm a little concerned, your Honor -- and I don't
8 believe that there is a conflict. I'm a little concerned about
9 your Honor's concern about this in terms of like whether your
10 Honor is feeling that your Honor has an obligation to do
11 something here. I am hopeful that we're all sort of feeling
12 like we could just walk forward and try to all calm ourselves
13 down a little bit. It's been a hard-fought trial and tempers
14 have been up, and I think we all realize, given what happened
15 today, that we all need to be politer and act in a way that
16 doesn't inflame each other. And I think we will all try to do
17 that.

18 And I think that, yes, we all sort of need to be able
19 to go forward, we all need an assurance that all the parties
20 here are feeling like let's move forward and put this behind
21 us. None of us are interested in going forward with any
22 prosecution or referral to an ethical organization. I feel
23 assured of that with the U.S. Attorney's Office. They have
24 taken the extraordinary step of having people very high up in
25 the office be here today and reaching out to us, and they put

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1 it on the record, what I understand to be an agreement, a
2 binding agreement. So I don't think -- I think that that
3 resolves the issue, the conflict issue.

4 The only other conflict issue, which we discussed
5 among ourselves and come to an agreement on, is we do not want
6 to cross on any of this. I will not be crossing on threats
7 made to witness, and Mr. Meringolo will not be cross-examining
8 on threats made to the witness. We discussed this with
9 Mr. Grant. He is comfortable with this.

10 And the reason we're doing this is we just think it's
11 a bad idea. We think it's a dangerous place to cross and we
12 have made a strategic decision as defense counsel not to do
13 that. The government did not condition their agreement on us
14 saying that. We have said that to the government, that we do
15 not intend to cross on this. Notwithstanding Mr. Meringolo's
16 statements this morning, it's just a poor idea. I have had
17 poor ideas, as your Honor pointed out earlier in the case,
18 also, and we could all do -- it's a stepping back from it. It
19 would be a poor idea for the defense to cross on this, and we
20 have no intention of getting into this area.

21 And I think that that takes the other sort of area,
22 the issue of what could be a potential conflict, off the table.
23 There won't be an issue where any of us will be putting
24 ourselves into the trial in terms of a cross-examination.

25 THE COURT: Thank you. Counsel for the United States,

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1 to be clear, what I understand to be the government's agreement
2 is that under no circumstances will the United States,
3 represented by the office of the Southern District of New York,
4 take any action against Mr. Meringolo with respect to the
5 conduct described here.

6 Are there any contingencies or requirements associated
7 with that or any circumstances in which the United States might
8 retreat from that position?

9 MS. LONERGAN: One moment, your Honor.

10 (Pause)

11 MS. LONERGAN: Your Honor, there are no circumstances,
12 there are no contingencies.

13 THE COURT: Thank you. Are there any circumstances in
14 which the facts underlying this incident might influence or
15 affect the way that the United States approaches cases brought
16 by Mr. Meringolo in the future?

17 MS. LONERGAN: No, your Honor. No, your Honor. This
18 is -- I think Ms. Necheles put it very, very well today, which
19 is that this has been an extremely hard-fought trial. It has
20 been emotional at times. And I think there was, as the Court
21 said earlier, an unfortunate incident that happened earlier
22 today, but what we are all trying to do, your Honor, is to move
23 forward from this point to conduct the rest of this trial
24 professionally and to really do what we are all set here to do,
25 which is to give these two defendants their day in court and

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1 present the case to the jury to allow the jury to make a
2 decision.

3 (Continued on next page)

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1 THE COURT: Good. Thank you. And the agreement
2 applies both to the alleged -- I should say what was described
3 by counsel for the United States as a direct threat to the
4 witness; is that right?

5 MS. LONERGAN: That's correct, your Honor.

6 THE COURT: And it also applies to what Mr. Bell
7 described as a physical assault on him?

8 MS. LONERGAN: That's correct, your Honor.

9 THE COURT: Thank you.

10 Has Mr. Bell disclaimed any prospect of bringing civil
11 action against Mr. Meringolo as a result of that assault?

12 MS. LONERGAN: One moment?

13 (Pause)

14 MS. LONERGAN: Your Honor, just to clarify one thing:
15 I think we didn't characterize the statement to the witness as
16 a threat; we characterized it just as a remark, to make the
17 record clear.

18 But, secondly, and I think more importantly, as to the
19 Court's second question, Mr. Bell is disclaiming any personal
20 right of action that he would have against Mr. Meringolo, to
21 the extent that he would have any.

22 THE COURT: Thank you.

23 Mr. Bell, is that correct?

24 MR. BELL: It is, your Honor. One moment, please?

25 (Pause)

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1 MR. BELL: That is, your Honor. That's the case.

2 THE COURT: Good.

3 MS. NECHELES: Your Honor.

4 (Pause)

5 MR. MERINGOLO: Your Honor, me personally would
6 disclaim any anything against Mr. Bell or anybody from the
7 government. I would disclaim anything, any potential action or
8 any cause of action, that I may or may not have -- I don't
9 know, but if I did, I would disclaim it.

10 THE COURT: Thank you. Good. I appreciate that.

11 First, let me say, I appreciate that the parties have
12 worked together to diffuse the situation. I understand that
13 counsel for the United States has undertaken not to pursue any
14 potential criminal action against Mr. Meringolo as a result of
15 this conduct, and that the office will not take this alleged
16 assault on a prosecutor into account going forward in cases in
17 which he's representing defendants against the office, and I
18 will accept that proffer as a true one.

19 As I understand it, counsel for the United States does
20 not understand that this agreement is one that makes a
21 difference in terms of whether or not the conflict, if any, is
22 waivable; in other words, they believe that they could have
23 gone through a Curcio proceeding, had me explain the nature of
24 the potential prosecution to Mr. Grant, and had him waive any
25 potential conflict. So since I understand that that is the

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1 position of the government, I understand that they have done
2 this out of what I'll describe as the goodness of their heart,
3 in order to help to calm the waters in this case, which is a
4 laudable step. I think that the waters needed to be calmed
5 here, and I thank you for that.

6 I still need to think about whether or not, given what
7 I understand to be the circumstances here, a Curcio hearing
8 would nonetheless be appropriate. I think all the lawyers here
9 know that the circuit asks me to take up waivers in
10 circumstances where there may be a possible conflict, on the
11 theory that it's easier for me to do it now than for them to
12 get the case on appellate review and send it back for a second
13 trial. So I'd like to consider the issues that you brought to
14 my attention, but, given the general guidance by the circuit
15 with respect to such potential conflicts, I think that the more
16 prudent path would be to conduct a Curcio hearing. I
17 understand that the nature of any potential conflicts as a
18 result is relatively constrained, and that the parties believe
19 uniformly that any potential conflict is waivable.

20 What I'd like to do, as a consequence, is to ask the
21 parties to help me, particularly the government, who will be
22 taking up the mantle of trying this case again in the event
23 that the colloquy is inadequate, to ensure that the questions
24 that I may ask Mr. Grant during the course of the hearing would
25 capture any potential conflicts, understanding that, at this

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1 point, taking the government's commitment and Mr. Bell's
2 personal commitment, that those prospects may be remote.

3 I expect to address both the prospect of, I'll call
4 it, some portion of the government not pursuing -- complying
5 with the office's agreement, which I am going to accept as
6 fully binding and completely unconditional, based on the
7 representations of the counsel who are here, and also to
8 address the prospect for any disciplinary action either here,
9 in the court, or with any bar organization.

10 I think it would be advantageous for us to undertake
11 that project today so that we can proceed to our trial day
12 tomorrow and to work effectively together to get as much
13 advantage out of the trial day tomorrow as we can, given our
14 lost day today.

15 So my proposal is that we take some time for me to
16 propose some questions for potential Curcio inquiry of
17 Mr. Grant, given what we've learned, the information that I've
18 been provided, which is very helpful, and I expect to describe
19 it. And I'd also ask for the parties to propose any potential
20 questions for the Court to ask, again, with the hope that the
21 inquiry will be sufficiently fulsome to protect the record and
22 to ensure that Mr. Grant is fully aware of any possible
23 consequences of this issue. So I'd like to do that. I'd like
24 to do that relatively promptly. It will take me some time to
25 formulate questions, and I'd like to ask the parties to help me

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1 do that, and I'd like to do it today.

2 I have already reached out to the CJA office, and I
3 understand that CJA counsel is available to do this at some
4 point later today.

5 My proposal then would be for us to take a break to
6 ask the parties to propose potential substantive questions for
7 the Curcio hearing, and for me to prepare a series of questions
8 in connection with that, that we can undertake later today.

9 MS. LONERGAN: Your Honor, may I inquire the name of
10 the CJA counsel? I ask that only because there have been many
11 lawyers for, for example, witnesses in this case, and we just
12 want to confirm that there's no conflict.

13 THE COURT: Thank you. I understand. It's
14 Mr. Pittell, P-i-t-t-e-l-l.

15 MS. LONERGAN: That should be fine, your Honor. Thank
16 you.

17 THE COURT: Good. Thank you.

18 I'd like to do this, and my goal would be to try to be
19 in a position to proceed this afternoon, perhaps around 3:00.
20 It's about 2:10 now. I think that in this window of time I can
21 prepare a script, and I'd ask that the parties propose any
22 potential substantive questions that you'd like for me to
23 inquire about in connection with the issues. Then we can come
24 back around 3:00 and hopefully conduct the hearing, if that
25 will provide adequate time for Mr. Grant.

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1 Counsel for Mr. Grant, what's your view on this
2 proposed approach?

3 MR. MERINGOLO: This is fine, Judge.

4 THE COURT: Fine. Thank you.

5 I expect that I will give Mr. Grant further
6 opportunity to confer with CJA counsel about these issues
7 before he makes a final decision about waiving any potential
8 issues, to the extent there are any, given the government's and
9 Mr. Bell's generosity with respect to the underlying incident.

10 So my proposal then would be to take a short recess,
11 to ask the parties to help me frame these questions, and for me
12 to frame the questions, and then to come back around 3:00 and
13 to try to finish addressing this set of issues.

14 I know the government had some issues that you wanted
15 to bring to my attention as well this morning. Would you like
16 to float those now so that I'm aware of them? Yes,
17 Ms. Lonergan.

18 MS. LONERGAN: Your Honor, I think it was primarily
19 about defense exhibits, which I know was also on the Court's
20 agenda for this afternoon. It would be the government's
21 position that we should address this matter first because we
22 think that that other matter can wait, and if we could take
23 this up first and make sure we can try to get some closure on
24 it today, I know we had prior briefing on defense exhibits. We
25 also received very early this morning, or late last night, a

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1 large number of additional defense exhibits, which we have not
2 yet had time to review all of them. So we were merely going to
3 put that on the record this morning, that we hadn't yet had
4 time to review all of them, and that we would potentially be
5 making objections, essentially on the fly, as those issues came
6 up.

7 THE COURT: Thank you.

8 MS. LONERGAN: We have had a little bit more time to
9 review them. We still I don't think necessarily will file a
10 brief, but, again, it's not necessary for us to do that today
11 if it will take time away from resolving what we think is this
12 more central issue.

13 THE COURT: Thank you. I appreciate that.

14 Let's take a short recess. Counsel for the United
15 States, again, I appreciate your views and those of counsel for
16 each of the defendants with respect to substantive questions
17 that I might ask, and/or your proposed description of what any
18 potential conflict may be. I understand that it is a vanishing
19 potential conflict, given the parties' agreements, but I think
20 it's better to cauterize this potential issue than proceed
21 without substantively addressing it through a Curcio, given
22 that we can do so relatively efficiently.

23 Counsel, if you can, please email to Mr. Daniels and
24 my chambers' email box whatever your views are. Please share
25 them with your adversary, so copy them on the email with your

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1 proposals. I will put something together, and I will tell you
2 what I expect to cover.

3 Counsel for Mr. Grant, I expect that you will let
4 Mr. Grant know what a Curcio hearing is, and the kind of
5 questions that he can anticipate there. Basically, Mr. Grant,
6 what I'll be doing is describing the nature of the possible
7 issues that may come up as a result of this, I'll be describing
8 to you what the nature is of your right to conflict-free
9 counsel, I will describe some hypothetical scenarios in which
10 this might give rise to conflicts, and, as you will hear, I
11 will ultimately be asking you to say back to me, in your words,
12 what it is that you understand the potential conflict to be so
13 that I can understand that you fully understand them as you are
14 making a decision about whether or not to waive these rights.

15 You will have independent counsel who I will obtain
16 for you, paid for by the CJA, the Criminal Justice Act, and
17 that person will be a resource to you in the event that you
18 want independent counsel in this issue.

19 I should say that while I have some hope that we will
20 be able to do this efficiently today, there is absolutely no rush.
21 This is not an issue that needs to be resolved today. It's
22 important, first and foremost, that Mr. Grant be comfortable
23 with any decision that he needs to make, and that he understand
24 fully the nature of the inquiry. If that requires more time
25 than is allotted today, that's not a problem, and we will take

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1 that time.

2 MS. NECHELES: Your Honor, can I be excused? This is
3 the conflict which I don't think is my issue at all.

4 THE COURT: Thank you.

5 Counsel for the United States, any concerns?

6 MS. LONERGAN: Your Honor, we have no objection, as
7 long as the Court is not intending to take up any other matters
8 today.

9 THE COURT: That's fine. I will excuse Ms. Necheles
10 and Mr. Reichberg, and I will eschew taking up any other
11 matters. I will ask my deputy to pass to the proposed limiting
12 instruction that I mentioned earlier so that you can have it at
13 hand and review it, be prepared to discuss it in the morning.

14 MS. NECHELES: Thank you, your Honor.

15 THE COURT: I'll see you all back here around 3:00.
16 Thank you.

17 (Recess)

18 THE COURT: Thank you very much, counsel. Welcome
19 back.

20 First, counsel, thank you very much for your proposed
21 questions. I will try to work them in as I proceed. Please
22 let me know if there are any additional questions that you'd
23 like for me to ask at any point during today's proceeding.
24 I'll give you the opportunity to do so, but please don't
25 hesitate to let me know if there's anything that you would like

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1 for me to raise.

2 First, let me confirm that Mr. Pittell is here,
3 counsel?

4 MR. PITTELL: Yes, I am. Good afternoon, your Honor.

5 THE COURT: Thank you very much.

6 I have asked Mr. Pittell to be here. He is the
7 Criminal Justice Act attorney on duty for today. I've asked
8 him to be here to provide Mr. Grant with independent legal
9 advice with respect to this issue. As I said earlier, I will
10 provide you, Mr. Grant, with an opportunity to confer with
11 Mr. Pittell, and I will give you as much time as you like in
12 order to consider the issues that are raised here. Let me
13 begin.

14 We are here today to conduct a hearing pursuant to
15 United States versus Curcio, which is 680 F.2d 881 (2d Cir.
16 1982). Mr. Grant has been indicted in a multicount indictment
17 for a number of offenses, about which we are all well aware
18 because we're in the midst of trial with respect to them.
19 Mr. Grant is represented, and has been represented throughout
20 this case, by Mr. Meringolo, and he is joined by Ms. Cappellino
21 of his office.

22 Mr. Grant, as you know, we are here conducting this
23 hearing as a result of the conduct that was described to me
24 this morning by counsel for the United States, by your counsel.
25 You were here. You heard the nature of those allegations. As

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1 a result, I will not describe them all completely, but, in sum,
2 in part for the benefit of Mr. Pittell, and limiting my
3 comments to the alleged improper conduct by Mr. Meringolo --
4 I'm not placing this in a broader context, and I understand
5 that there is a broader context -- the United States asserted
6 that Mr. Meringolo made improper contact with the principal
7 cooperating witness for the United States, telling him that he
8 was a disgrace, that counsel charged and shoved one of the
9 Assistant United States Attorneys in the hall outside the
10 courtroom, who had gone there in order to take counsel to task
11 for the alleged inappropriate statement to the witness, and
12 then the counsel later threatened counsel for the United
13 States, telling him, in essence, that I should drop you or
14 something along those lines.

15 That conduct could potentially be the subject of
16 criminal prosecution for interfering with or tampering with a
17 witness, threatening a prosecutor and potentially assault here
18 in a federal facility, among possible other offenses. It could
19 also be the subject for disciplinary proceedings, Mr. Grant,
20 against your counsel by the Court, the disciplinary of
21 committee of this Court, the bar associations or other
22 professional organizations, of which he may be a member.

23 As you heard, the office of the United States Attorney
24 for the Southern District of New York has agreed,
25 unconditionally in an unwritten verbal agreement, not to itself

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1 pursue Mr. Meringolo for any potential offenses, federal
2 criminal offenses, arising from the conduct that we discussed
3 earlier.

4 They have also said that they will not take that
5 conduct into account in the future. I said earlier that I
6 accept that proffer. You will have to evaluate, among other
7 things, whether or not you believe that the United States
8 Attorney's Office will not consider the conduct here against
9 one of its assistants, in future interactions with
10 Mr. Meringolo. That will be one of the issues that I will
11 bring to your attention as we discuss this. I should say,
12 there is also the prospect of potential civil liability on
13 account of your counsel as a result of what was described to
14 the Court as an assault. Mr. Bell has agreed to not pursue any
15 action with respect to such potential civil action.

16 Now, with respect to the office of the United States
17 Attorney for the Southern District of New York's agreement,
18 which I'll refer to as either "the office" or as "the USAO,"
19 that agreement is not written. It is not binding on other
20 offices of the Department of Justice or on what we call Main
21 Justice, and it's not written.

22 Mr. Bell, I said, has personally disclaimed any civil
23 cause of action against Mr. Meringolo, and those commitments by
24 the government and Mr. Bell, I believe, were proffered largely,
25 I think, out of a desire to calm the waters in this case

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1 generally but also to potentially mitigate any potential
2 conflict of interest resulting from this set of issues, but
3 there is still a potential conflict.

4 The government believes that that potential conflict
5 is waivable, meaning that so long as you understand the
6 potential conflicts and the ways in which it might affect
7 Mr. Meringolo and his representation of you in this case --
8 when I say Mr. Meringolo, I refer to him and his firm but
9 principally to Mr. Meringolo -- you can waive that right to a
10 conflict-free representation. The purpose of this hearing is
11 for me to make sure that you understand the potential conflict,
12 how it might potentially impact your defense, and also, if you
13 choose to waive your right to conflict-free representation, to
14 ensure that your waiver is made voluntarily and knowingly.

15 So I hope that that's a helpful introduction. The
16 remainder of today's hearing will be focused on accomplishing
17 those goals.

18 Counsel, before we proceed further, is there anything
19 that any of you would like to add to my description of what
20 I'll call the overview of what it is that I expect to achieve
21 during this proceeding? Counsel for the United States?

22 MS. LONERGAN: No, your Honor.

23 THE COURT: Thank you.

24 Mr. Meringolo or Ms. Cappellino?

25 MS. CAPPELLINO: No, your Honor.

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1 THE COURT: Good. Thank you very much.

2 So, Mr. Grant, as I explained, the purpose of this
3 proceeding is to make sure that you understand the potential
4 risks from having Mr. Meringolo and his firm serve as your
5 attorney, and to make sure that you've carefully considered
6 those risks, and are making an informed and voluntary decision
7 about who you want as your attorney here. I want to make sure
8 that you have as full an understanding as I can provide to you
9 about all of the issues that a defendant should consider in
10 making that choice. It's important that you make a wise
11 decision of that issue for yourself, and that is the purpose of
12 what we will be doing going forward.

13 Do you understand that?

14 DEFENDANT GRANT: Yes, sir.

15 THE COURT: Thank you.

16 Mr. Grant, I'm going to be asking you a number of
17 questions to make sure that you are able to understand the
18 proceedings today, and then I'm going to describe some of the
19 potential conflicts of interests, and I will ultimately ask you
20 to decide whether you wish for Mr. Meringolo and his firm to
21 continue to represent you.

22 Because I'm going to be asking you a number of
23 questions in connection with this proceeding, I'm going to ask
24 my deputy to administer an oath requiring that you answer my
25 questions truthfully. Would you please stand for

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1 administration of the oath.

2 (Defendant Grant sworn)

3 THE COURT: Thank you, Mr. Grant. You can be seated.

4 Mr. Grant, you're now under oath, which means that if
5 you answer any of my questions falsely, you can be prosecuted
6 for the separate crime of perjury or making a false statement.
7 The government would have the right to use any statement that
8 you give under oath against you in such a prosecution.

9 Do you understand that?

10 DEFENDANT GRANT: Yes, sir.

11 THE COURT: Thank you.

12 First, can you tell us tell me your full name?

13 DEFENDANT GRANT: James Grant.

14 THE COURT: Thank you.

15 How old are you?

16 DEFENDANT GRANT: Forty-five.

17 THE COURT: Thank you.

18 How far did you go in school?

19 DEFENDANT GRANT: Bachelor's degree.

20 THE COURT: Thank you. I have some understanding of
21 your employment experience.

22 Have you ever been treated or hospitalized for any
23 mental illness?

24 DEFENDANT GRANT: No, sir.

25 THE COURT: Are you currently, or have you recently

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1 been, under the care of a physician, psychiatrist or
2 psychologist?

3 DEFENDANT GRANT: Yes.

4 THE COURT: Thank you.

5 Is there any condition -- you can remain seated until
6 I ask you to stand.

7 DEFENDANT GRANT: Okay.

8 THE COURT: Thank you, though.

9 Is there any condition that limits your ability to
10 hear or understand what's happening in today's proceeding?

11 DEFENDANT GRANT: No, sir.

12 THE COURT: Thank you.

13 Within the past 24 hours, have you used or taken any
14 alcohol, drugs or medication?

15 DEFENDANT GRANT: No, sir.

16 THE COURT: Thank you.

17 Is your mind clear today?

18 DEFENDANT GRANT: Yes, sir.

19 THE COURT: Do you understand what's happening in this
20 proceeding?

21 DEFENDANT GRANT: Yes, sir.

22 THE COURT: Thank you.

23 Counsel, do any of you have any doubt as to
24 Mr. Grant's competency to proceed here today?

25 MS. LONERGAN: No doubt, your Honor.

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1 MR. MERINGOLO: No, your Honor.

2 THE COURT: Thank you.

3 Based on Mr. Grant's answers to my questions, my
4 observations of his demeanor in the courtroom today, and
5 counsel's representations, I find that Mr. Grant is competent
6 to proceed with this hearing.

7 Mr. Grant, I'm going to review a number of scenarios
8 with you today, and I'm going to ask you a number of questions.
9 At some point, as I signaled to you earlier, I'm going to ask
10 you to state your understanding of these issues in your own
11 words, and then I will ask you whether or not you want for
12 Mr. Meringolo to work on your case.

13 So please listen carefully to my questions, and
14 remember that at the end of the proceeding, I'll be asking you
15 to tell me what your understanding of the potential issues are.

16 DEFENDANT GRANT: Excuse me, your Honor?

17 THE COURT: Yes.

18 DEFENDANT GRANT: Is Mr. -- the attorney, CJA
19 attorney, I didn't get a chance to talk to him.

20 THE COURT: Thank you. I'll give you ample
21 opportunity do that.

22 DEFENDANT GRANT: I didn't know if you wanted me to
23 answer.

24 THE COURT: Thank you. I'll give you the opportunity
25 to do that. And if at any point during today's proceeding,

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1 Mr. Grant, you'd like to confer with either counsel, either
2 Mr. Meringolo or Mr. Pittell, please don't hesitate to let me
3 know. I'd be happy to give you as much time as you like to do
4 that at any point, whether now or at a later stage in the
5 proceeding.

6 Would you like to take time to confer with him at this
7 point?

8 DEFENDANT GRANT: No, no. Just my understanding of
9 your question was that you were going to ask me to give my
10 answer or opinion of what was going on, and I didn't really
11 consult with the attorney. That's all.

12 THE COURT: Thank you. You will have the opportunity
13 to do that before I ask --

14 DEFENDANT GRANT: I apologize.

15 THE COURT: That's not a problem. Thank you.

16 First, Mr. Grant, you're currently represented by
17 Mr. Meringolo; is that correct?

18 DEFENDANT GRANT: Yes, sir.

19 THE COURT: Thank you.

20 Do you wish to continue to be represented by him and
21 his firm?

22 DEFENDANT GRANT: Yes, sir.

23 THE COURT: Have you been satisfied with his
24 representation so far in the case?

25 DEFENDANT GRANT: Yes, sir.

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1 THE COURT: Thank you.

2 How long has Mr. Meringolo represented you?

3 DEFENDANT GRANT: Since approximately three years.

4 THE COURT: Thank you.

5 How long have you known him?

6 DEFENDANT GRANT: Approximately three years.

7 THE COURT: Thank you.

8 Has Mr. Meringolo represented you in any other
9 matters?

10 DEFENDANT GRANT: No, sir.

11 THE COURT: Thank you.

12 Has Mr. Meringolo informed you of the details of the
13 incident that occurred this morning and the issues that bring
14 us to this place?

15 DEFENDANT GRANT: Yes, sir.

16 THE COURT: Thank you.

17 Now, do you understand that the conduct of
18 Mr. Meringolo, as described by the prosecution to the Court and
19 the parties, might form the basis for a potential federal
20 criminal action against him?

21 DEFENDANT GRANT: Yes, sir.

22 THE COURT: Do you understand, however, that the
23 office of the United States Attorney for the Southern District
24 of New York has agreed not to prosecute him for any such claims
25 or to refer them to any other federal prosecutorial body?

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1 DEFENDANT GRANT: Yes, sir.

2 THE COURT: Are you aware that the United States
3 Attorney's Office has no authority to bind the Department of
4 Justice as a whole or any other United States Attorney's
5 Office?

6 DEFENDANT GRANT: Yes, sir.

7 THE COURT: Do you understand that the agreement by
8 the United States is not in writing?

9 DEFENDANT GRANT: Yes, sir, I understand.

10 THE COURT: Thank you.

11 Do you understand that, as a result, even with the
12 agreement by the United States, the United States Attorney's
13 Office, it is possible that a component of the Department of
14 Justice might pursue these claims against Mr. Meringolo despite
15 the agreement by the office?

16 DEFENDANT GRANT: Yes, sir.

17 THE COURT: Are you aware that the alleged, I'll call
18 it, shove described by Mr. Bell might form the basis of a civil
19 action by Mr. Bell personally against Mr. Meringolo?

20 DEFENDANT GRANT: Yes, sir.

21 THE COURT: Do you understand that despite Mr. Bell's
22 representation to the Court on that issue, that there is no
23 written agreement between him and Mr. Meringolo that would be
24 enforceable to present in such an action?

25 DEFENDANT GRANT: Yes, sir.

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1 THE COURT: Are you aware that the conduct described
2 by counsel for the United States might form the basis for
3 professional disciplinary action against Mr. Meringolo by the
4 court, meaning this court, or any bar or other professional
5 organization to which Mr. Meringolo is a member?

6 DEFENDANT GRANT: Yes, sir.

7 THE COURT: Thank you.

8 Now, do you understand that because of the conduct
9 that I have described and the potential exposure that I have
10 suggested and outlined for you, that Mr. Meringolo may, as a
11 result, act differently toward the government and the Court in
12 his representation of you?

13 DEFENDANT GRANT: Can you repeat that?

14 THE COURT: Yes. Do you understand that because of
15 the conduct that I've described, that Mr. Meringolo may -- I'm
16 not saying will but may -- act differently toward the
17 government or the Court in his representation of you?

18 DEFENDANT GRANT: Yes, sir.

19 THE COURT: Thank you.

20 What I mean be by this, to expand, although you
21 understand already, is that Mr. Meringolo might have an
22 incentive to curry favor with the United States Attorney's
23 Office because he would want the government to view him more
24 favorably.

25 Do you understand that he might also be conceivably be

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1 tempted to take actions that might not be to your benefit in
2 order to assist or defend himself against possible future
3 investigation by offices of the government of the United States
4 that are not bound by the United States Attorney's Office's
5 commitment to him? Do you understand that?

6 DEFENDANT GRANT: Yes, sir.

7 THE COURT: Do you understand that Mr. Meringolo might
8 seek to curry favor with Mr. Bell personally in order to ensure
9 that Mr. Bell does not pursue a civil action or other action
10 against him as a result of the alleged assault?

11 DEFENDANT GRANT: Yes, sir.

12 THE COURT: Alternatively, do you understand that
13 Mr. Meringolo might have an incentive to be hostile toward the
14 federal government, as represented here, either because of his
15 personal anger or resentment toward the United States against
16 the Department of Justice, and Mr. Bell in particular?

17 DEFENDANT GRANT: Yes, sir.

18 THE COURT: Thank you.

19 Now, Mr. Meringolo expressed some anger toward
20 Mr. Bell earlier today. I hope that the concession by the
21 government and Mr. Bell will help to calm those waters, but do
22 you understand that it's possible that the existence of this
23 conduct and the potential criminal or civil liability or
24 disciplinary actions as a result of the conduct could cause
25 Mr. Meringolo to have incentives that are not entirely aligned

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1 with your interests, and that could affect the way that
2 Mr. Meringolo advises you?

3 DEFENDANT GRANT: Yes, sir.

4 THE COURT: Do you understand that because of the
5 possibility of disciplinary action against him by the Court or
6 another organization, that Mr. Meringolo may have a personal
7 interest in how he conducts this litigation so as to limit his
8 possible personal exposure to such sanctions or disciplinary
9 action?

10 DEFENDANT GRANT: Yes, sir.

11 THE COURT: Mr. Grant, do you know the rules of
12 soccer?

13 DEFENDANT GRANT: Soccer?

14 THE COURT: Yes.

15 DEFENDANT GRANT: No.

16 THE COURT: Fine.

17 I won't use this analogy. The analogy I wanted to use
18 is a soccer player with a yellow card.

19 DEFENDANT GRANT: Oh, yeah, I do know that, yes, sir.

20 THE COURT: Fine. So you understand that --

21 DEFENDANT GRANT: The penalty.

22 THE COURT: -- the soccer player with a yellow card
23 may play differently because they have a yellow card hanging
24 over their head, so they hope they don't get ejected. I think
25 that's a reasonable analogy to help us understand this.

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1 Because of the alleged prior misconduct, Mr. Meringolo
2 may have a personal interest in comporting himself in a way
3 that does not invite sanction or future disciplinary action.

4 Do you understand that?

5 DEFENDANT GRANT: Yes, sir. It's a good analogy.

6 THE COURT: Thank you.

7 Now, my hope is to ensure that you fully understand
8 your rights and the potential conflicts that could arise from
9 Mr. Meringolo's continued representation of you. I'm going to
10 turn to those potential conflicts now. And, again, I emphasize
11 these are potential conflicts, as I'll say it, and part of the
12 problem here is that I cannot anticipate all of the possible
13 ways in which this will be a concern, so I've tried, in the
14 window of the time that's been available, to come up with some
15 examples, but ultimately, as you'll hear, the problem is that
16 it's difficult for us or me to predict all of the possible ways
17 that this can come up.

18 But first let me describe the duties of an attorney to
19 you. An attorney has a responsibility to represent a client to
20 the best of his ability, giving that client the attorney's best
21 advice about the client's legal options, and keeping
22 confidential any information the client gives to the attorney.

23 Do you understand that?

24 DEFENDANT GRANT: Yes, sir.

25 THE COURT: One of those responsibilities is the duty

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1 of loyalty. The duty of loyalty means that an attorney must
2 exercise his professional judgment solely for the benefit of
3 his client. That means that a lawyer's own interests should
4 not be permitted to have an adverse effect on the
5 representation of the client.

6 Do you understand that?

7 DEFENDANT GRANT: Yes, sir.

8 THE COURT: Now, let me try to give you some examples
9 of the ways in which the prospect of criminal or civil
10 liability or disciplinary action against Mr. Meringolo could
11 adversely affect his representation of you in this case. It
12 could affect him in the way in which he considers and advises
13 you on whether you cooperate with the government, the arguments
14 that you make, that he makes on your behalf, and, in
15 particular, what arguments to make to the Court.

16 It could, indeed, affect each of the varying different
17 stages of the remaining stages of the prosecution. It could
18 affect the way in which Mr. Meringolo advises you whether,
19 when, or if you should plead guilty, whether you should seek to
20 cooperate with the United States, what defenses you should
21 raise, whether you should testify here at trial, which
22 witnesses should be cross-examined, and what questions should
23 be asked, what witnesses to call, and what evidence should be
24 offered on your behalf, what arguments you may seek to make to
25 the jury, and what arguments to make to the Court, and what

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1 facts to bring to the Court's attention, both during the trial
2 and, in the event that you're convicted, at your sentencing.

3 Do you understand that it could affect any of the
4 remaining stages of this case?

5 DEFENDANT GRANT: Yes, I do, sir.

6 THE COURT: Thank you.

7 Now let's talk about this briefly in the context of
8 various points in your prosecution. We'll talk about the
9 impact potentially at trial and also at sentencing. While I
10 will describe some of these issues in the context of each of
11 those stages, you should understand that it's possible that any
12 of these issues that I articulate may apply to all of the
13 stages of this proceeding.

14 So, first, during the trial, you're entitled to have
15 your attorney work diligently on your behalf. Among other
16 things, your attorney should be able to vigorously
17 cross-examine witnesses against you, if that is in your
18 interest, and should be able to make any arguments to the Court
19 and to the jury that will help you win an acquittal of the
20 charges against you.

21 In this case, because of this incident, your counsel
22 and counsel for Mr. Reichberg have already given up the
23 opportunity to cross-examine Mr. Rechnitz related to this
24 incident and potentially with respect to other instances in
25 which he allegedly misidentified people who were allegedly

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1 threatening him.

2 Your counsel may also choose to generally pursue less
3 rigorous cross-examination of the government's witnesses if he
4 believes that doing so would benefit him personally, in order
5 to curry favor with the United States to ensure that they
6 remain committed to the agreement that was provided to them and
7 to ensure that other components of the federal government to
8 not pursue action against him.

9 Do you understand that?

10 DEFENDANT GRANT: Yes, sir.

11 THE COURT: Thank you.

12 He might also choose not to challenge the introduction
13 of evidence by the United States or to limit the scope of the
14 evidence introduced on your behalf in order, again, to curry
15 favor with representatives of the United States.

16 Do you understand that?

17 DEFENDANT GRANT: Yes, sir, I understand.

18 THE COURT: Thank you.

19 Do you understand that, conversely, your counsel might
20 act angrily toward the government, based on his personal
21 feelings regarding this incident, in a way that may be
22 counterproductive to your interests as the defendant in this
23 case?

24 DEFENDANT GRANT: Yes, I understand.

25 THE COURT: Thank you.

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1 Do you understand that he also might not as vigorously
2 take on disputed issues with the Court, in order to protect
3 against possible disciplinary action or referral with respect
4 to the conduct underlying this hearing?

5 DEFENDANT GRANT: Yes, I understand.

6 THE COURT: Good. Thank you.

7 Do you understand that, for the same reasons,
8 Mr. Meringolo may modify his presentation of issues to the
9 jury? Alluding back to the yellow card example, you've seen
10 Mr. Meringolo in the past, strategically stray near the line in
11 order to benefit your interests. Do you understand that he may
12 in the future choose not to tread so close to the line, given
13 the prospect of potentially disciplinary actions by the Court
14 or other professional bar organizations?

15 DEFENDANT GRANT: Yes, sir; no red cards.

16 THE COURT: Thank you.

17 Let's talk about the sentencing phase. Let's assume,
18 just for these purposes, that you have been convicted, either
19 because you've pleaded guilty or because you went to trial, and
20 the jury has found you guilty. The next phase of the
21 prosecution will be your sentence. At the sentencing phase,
22 you will want your attorney to make any argument to the
23 sentencing judge that's available to you in order to ensure
24 that you get the most lenient sentence possible.

25 Now, in this instance, for example, Mr. Meringolo may

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1 not be willing to take the position that government conduct
2 during your prosecution or court conduct during your
3 prosecution was unreasonable.

4 DEFENDANT GRANT: I understand, sir.

5 THE COURT: Thank you.

6 Another possibility is that Mr. Meringolo might not
7 have the incentive to argue that the Court vary below any
8 sentencing guideline range recommended in your case, concerned
9 that such an argument against the government's position could
10 be taken against him personally.

11 Similarly, Mr. Meringolo might be reluctant to submit
12 additional materials in support of a request for a more lenient
13 sentence as he may be concerned that the government or the
14 Court would see the submissions as burdensome. He may not want
15 to speak forcefully in opposition to the government in your
16 sentencing hearing, as at various stages during the trial
17 itself, as he may want to appear more amenable to the
18 government or to the Court.

19 Mr. Meringolo's guidance regarding whether or not you
20 may wish to offer to cooperate with the government may be
21 tainted because he may wish to encourage you to cooperate with
22 the government in order to gain favor with it. He may fail to
23 preserve errors by objecting to elements of the government's
24 presentation of evidence at trial or at sentencing, again, in
25 order to gain favor with the United States or with the Court.

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1 In sum, Mr. Meringolo may be reluctant to take
2 positions in your case that the Court disapproves or that the
3 government opposes because of a desire to help himself in
4 connection with any potential action against him as a result of
5 the conduct that has given rise to this component of today's
6 proceedings.

7 Now, on the other hand, Mr. Meringolo's personal
8 feelings about his situation and the conduct underlying today's
9 set of circumstances might lead him to act out against the
10 United States, the government's attorneys, or in a way that
11 does not favor your interests. It could cause him to become
12 hostile to the government or unnecessarily adversarial with the
13 government in a way that might not be in ultimately your best
14 interests. He might encourage you, for example, not to
15 cooperate with the government, if you had the opportunity to do
16 so, if he thought that that might frustrate the government.

17 Also, it's possible that Mr. Meringolo's own matter
18 might lead him to develop hostility to the Court or to the
19 government. He might take positions or make arguments in your
20 case that risk making the Court or the government less
21 sympathetic to you in connection with any ultimate sentencing
22 in your case in connection with the government's
23 recommendations regarding your possible sentence and the
24 Court's determinations with respect to what the appropriate
25 sentence might be, in the event that you're ultimately

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1 convicted.

2 So I've just tried to give you a number of comparables
3 that spread across the trial phase and also the sentencing
4 phase of this case, in the event that the jury convicts you of
5 any of the counts for which you've been indicted.

6 Do you understand all of the examples that I have just
7 given you?

8 DEFENDANT GRANT: Yes, sir.

9 THE COURT: Thank you.

10 Now, I've explained a number of different scenarios in
11 which a conflict might arise as a result of this set of issues.
12 You should realize, as I've tried to suggest earlier -- have
13 said earlier -- that I haven't discussed with you, and am not
14 able to foresee, all of the ways in which a conflict might
15 surface and in which you might be harmed.

16 Do you understand that?

17 DEFENDANT GRANT: Yes, sir.

18 THE COURT: Thank you.

19 The thing that you should understand is that I don't
20 know all the ways in which Mr. Meringolo's conduct today might
21 potentially affect his decisions about how to represent you.
22 Do you understand that perhaps the greatest danger to you lies
23 in the inability by me and others to foresee all of the
24 possible conflicts that might arise because of the issues that
25 we've talked about potentially implicating the personal

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1 interests of your counsel, on the one hand, and you, on the
2 other? Do you understand that?

3 DEFENDANT GRANT: Yes, sir.

4 THE COURT: Thank you.

5 Now, I am going to give you the opportunity, if you'd
6 like, to confer further with Mr. Pittell. You can do that now
7 or after I ask you to talk to me about your understanding of
8 the nature of the potential issues that could arise if you
9 choose to proceed with Mr. Meringolo and his firm's
10 representation here. Typically, I ask a defendant to tell me
11 his view of the conflicts before they confer with counsel, but
12 I'd be very happy to allow you to confer further with counsel
13 now if you'd prefer to do that before I ask you to present your
14 views on this issue to the Court.

15 What would you prefer to do? Feel free to consult
16 with counsel before responding.

17 DEFENDANT GRANT: If it's okay, your Honor, I'd like
18 to speak to counsel now, before.

19 THE COURT: That's fine.

20 Let me just say this: When we come back, what I
21 expect to do, Mr. Grant, is to ask you to tell me, in your
22 words, what you understand the potential conflict to be if
23 Mr. Meringolo and his firm continues to represent you in this
24 matter, in light of the potential conflicts, albeit mitigated
25 conflicts, that we've discussed earlier, and I will ask you to

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1 do that in your words. And I'm happy to take that up after
2 you've had the opportunity to confer. Please, again, take as
3 much time as you like to do this. There is no rush. The most
4 important thing is for you to feel comfortable with this
5 decision and to feel comfortable that you understand all of the
6 possible permutations of the potential issue.

7 I'm going to step down now. Please let Mr. Daniels
8 know when you're ready to proceed. It may be, depending on how
9 long we need, that I'll need to take up another matter
10 downstairs. If so, I'll come back up here as soon as I'm able.
11 Thank you, all.

12 (Recess)

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1 THE COURT: So we're back on the record after a recess
2 during which Mr. Grant had the opportunity to confer with
3 Mr. Pittell.

4 Mr. Grant, have you had the opportunity to consult
5 with CJA counsel?

6 DEFENDANT GRANT: Yes, sir.

7 THE COURT: Have you had sufficient time to consult
8 with him?

9 DEFENDANT GRANT: Yes, sir.

10 THE COURT: Good. Thank you. So Mr. Grant, I would
11 like to ask you to tell me in your words what you understand
12 the potential conflict to be if Mr. Meringolo and his firm
13 continues to represent you in this matter. What can you tell
14 me?

15 DEFENDANT GRANT: Basically, Judge, my understanding
16 is that because of the altercation that occurred earlier today
17 that the conflict could possibly be that going forward
18 Mr. Meringolo would kind of be -- kind of a fork in the road
19 whether or not he represented me to the best of his ability and
20 had my rights, you know, like just basically represent me the
21 way that he has been, and going forward I do believe that he
22 will, you know, have my best interests going forward.

23 THE COURT: Thank you. What can you tell me about the
24 kind of scenarios in which the conflict of interest --
25 potential conflict of interest might affect Mr. Meringolo's

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1 representation of you? You can give me your understanding of a
2 few of the examples of situations in which it could come up to
3 help me understand that you perceive them.

4 DEFENDANT GRANT: One scenario would be that I guess
5 Mr. Meringolo in his mind thinks that the government is going
6 to pursue any charges, whether criminally or civilly, that he
7 might look to curry favor with the government or not vigorously
8 defend me the way he has been. And I understand that that
9 conflict might arise, but if it does, I truly believe that he
10 will continue to vigorously defend me.

11 I'm happy with my representation. I wouldn't have any
12 other lawyer going forward. That's who I want to represent me,
13 and I know that he will do it to his best ability.

14 THE COURT: Thank you. What can you tell me about
15 your understanding regarding potential concerns about
16 Mr. Meringolo acting the other way, i.e., not to curry favor
17 with the government but with hostility.

18 DEFENDANT GRANT: I understand that because he might
19 be upset and angry that he might just kind of like go on a
20 tantrum and not look for my best interests to represent me the
21 proper way. And I feel like that's not going to happen, and
22 going forward I don't anticipate him becoming unhinged and
23 doing that.

24 THE COURT: Thank you.

25 Counsel, is there any additional amount of information

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1 that you believe I should solicit from Mr. Grant before we
2 proceed? Counsel for the United States?

3 MS. LONERGAN: Not before we proceed, your Honor.

4 THE COURT: Thank you. Counsel for Mr. Grant,
5 Mr. Pittell or Ms. Cappellino?

6 MS. CAPPELLINO: No, your Honor.

7 MR. PITTELL: None from me, your Honor.

8 THE COURT: Thank you.

9 Mr. Grant, if at the end of today's proceeding I
10 approve Mr. Meringolo's and his firm's representation of you,
11 you never will be able to complain about these issues again.
12 If you are sentenced after a conviction you will not be able to
13 say that your attorney did not represent you properly because
14 of the potential exposure resulting from today's alleged
15 conduct.

16 This is your last opportunity to complain about that
17 potential problem. Do you understand that?

18 DEFENDANT GRANT: Yes. On this issue I wave the white
19 flag.

20 THE COURT: Thank you. Have you discussed all the
21 issues that we talked about today with Mr. Pittell and your
22 current counsel?

23 DEFENDANT GRANT: Yes, sir, I have.

24 THE COURT: Is there anything that you would like for
25 me to explain further about these issues?

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1 DEFENDANT GRANT: No, sir.

2 THE COURT: Thank you. Now do you understand,
3 Mr. Grant, that in every criminal case, including this one, the
4 defendant is entitled to assistance of counsel whose loyalty to
5 him is undivided, who is not subject to any factor that might
6 in any way intrude upon an attorney's loyalty to his interests.
7 Do you understand that?

8 DEFENDANT GRANT: Yes, I do.

9 THE COURT: In other words, do you understand that you
10 are entitled to the representation by an attorney who only has
11 your interest in mind and not his own interests?

12 DEFENDANT GRANT: Yes, sir.

13 THE COURT: Do you understand that you are entitled to
14 object to Mr. Meringolo's continued representation of you based
15 on the existence of potential conflict of interest?

16 DEFENDANT GRANT: Yes, sir.

17 THE COURT: Now after considering everything that we
18 have discussed today about the ways in which this series of
19 issues could adversely affect your defense, do you believe that
20 it is in your best interest to continue with Mr. Meringolo and
21 his firm as your counsel in this case?

22 DEFENDANT GRANT: Yes, sir.

23 THE COURT: Do you wish for Mr. Meringolo and his firm
24 to continue to represent you here?

25 DEFENDANT GRANT: Yes, sir.

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1 THE COURT: Do you understand that by choosing to
2 continue with Mr. Meringolo and his firm as your counsel,
3 you're waiving your right to be represented solely by an
4 attorney who has no conflict of interest?

5 DEFENDANT GRANT: Yes, sir.

6 THE COURT: Do you understand that by waiving your
7 right to conflict-free counsel you are relinquishing any
8 post-conviction argument on appeal or otherwise that by virtue
9 of this series of issues and any potential liability, civil,
10 criminal or otherwise, against Mr. Meringolo, that you were
11 denied effective assistance of counsel by him or his firm?

12 DEFENDANT GRANT: Regarding this issue, right?

13 THE COURT: Correct.

14 DEFENDANT GRANT: Yes, sir.

15 THE COURT: Thank you. Has anyone made any promise to
16 you or made any threat to you that has caused you to choose
17 Mr. Meringolo or his firm to work as your lawyer in this case?

18 DEFENDANT GRANT: No, sir.

19 THE COURT: Are you knowingly and voluntarily waiving
20 your right to conflict-free representation?

21 DEFENDANT GRANT: Yes, sir.

22 THE COURT: Thank you. Counsel for the United States,
23 do you have any additional questions that you would like me to
24 ask Mr. Grant at this time?

25 MS. LONERGAN: No, your Honor.

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1 THE COURT: Thank you. Counsel for Mr. Grant, any
2 additional questions that any of you would like me to ask at
3 this time?

4 MS. CAPPELLINO: We do not, your Honor.

5 THE COURT: Thank you. Mr. Pittell?

6 MR. PITTELL: No, your Honor.

7 THE COURT: Thank you. I find that Mr. Grant has
8 knowingly and voluntarily chosen Mr. Meringolo and his firm to
9 represent him in this case, and that Mr. Grant has waived his
10 right to conflict-free representation.

11 Good. Thank you very much for your participation in
12 this, Mr. Grant and counsel. Thank you, Mr. Pittell, for
13 stepping in for this proceeding.

14 MR. PITTELL: You're welcome.

15 THE COURT: Thank you. Before we recess for the day,
16 I just want to thank the government again for taking what was I
17 think, as I said earlier, an unnecessary and therefore
18 particularly generous action with respect to this conduct. And
19 I appreciate that for what it was and I thank you for it.

20 And I thank Mr. Bell and Mr. Meringolo each personally
21 for helping also to calm the waters. I expect this case will
22 continue to be vigorously litigated on behalf of Mr. Grant and
23 Mr. Reichberg and the United States, but I hope that we come to
24 a pass where that can happen in a way that is less emotionally
25 fraught going forward.

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1 Anything else that we can take up in the absence of
2 Mr. Reichberg and his counsel, counsel for the United States?

3 MS. LONERGAN: No, your Honor, thank you.

4 THE COURT: Thank you. Counsel for Mr. Grant?

5 MS. CAPPELLINO: No, your Honor.

6 THE COURT: Good. Thank you all. Have a good night.
7 I will see you tomorrow.

8 MS. LONERGAN: Thank you.

9 (Adjourned to November 28, 2018, at 9:00 a.m.)